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No. 05-1597

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In The
Supreme Court of the United States

WILLIAM TUCKER AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CYNTHIA DOLORES TUCKER, A/K/A C. DOLORES TUCKER, FOR C. DOLORES TUCKER, DECEASED AND WILLIAM TUCKER,

Petitioners,

v.

PHILADELPHIA DAILY NEWS, PHILADELPHIA NEWSPAPERS, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The Pennsyvlania Supreme Court

BRIEF IN OPPOSITION OF THE LEGAL INTELLIGENCER

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STATEMENT OF THE QUESTION PRESENTED

Whether a public figure plaintiff who alleged she told "a few" media defendants before publication that the loss of consortium claims asserted in a reported lawsuit did not include harm to sexual relations, and whose claim was dismissed when she failed to re-plead that present defendants were among those so informed, was deprived of any Constitutionally-protected right to prove the newspapers acted with actual malice.

RULE 29.6 DISCLOSURE STATEMENT

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STATEMENT OF THE CASE

Respondent, the *Legal Intelligencer*, is satisfied with the material facts and references to the appendix as presented by co-respondent the *Philadelphia Daily News* in its statement, which is incorporated by reference.

ARGUMENT

Respondent the *Legal Intelligencer* joins in co-respondent the *Philadelphia Daily News*' brief in opposition which discusses the ample reasons why the petition should not be granted. The petition not only fails to raise a compelling reason, it offers no reason for this Court to accept review. Petitioners do not suggest that the challenged decision conflicts with a decision of a United States Court of Appeals, or another state's court of last resort on any particular issue. Pa.Sup.Ct.Rule 10. Nor do petitioners claim that the Pennsylvania court misunderstood or misapplied this Court's actual malice standard. As the *Philadelphia Daily News* argues, to the extent petitioners mean to challenge Pennsylvania's fact-pleading standards as applied to defamation claims, and this Court would have jurisdiction to consider that issue, petitioners have likewise raised no compelling reason to undertake such a review.

Instead, the petition relies on a distortion of the record to construct an argument that suggests a conflict between the Pennsylvania Supreme Court's decision and an undisclosed decision of this Court. Although petitioners argue otherwise, the Pennsylvania Supreme Court did no more here than to remand this case to the trial court, allow petitioner a further opportunity to properly plead a defamation claim, and then affirm dismissal of the claim

when petitioners failed to do so. That court did not, as petitioners assert, apply a general rule that a public figure plaintiff must allege that she unequivocally told a newspaper that what it was about to print was false in order to maintain a defamation claim. The court merely affirmed the dismissal of a defamation claim premised on allegations concerning a published statement that was not false, and that could not raise an inference of actual malice.

As public figures, petitioners were required to prove by clear and convincing evidence that the alleged defamatory statement was false, and that the newspapers either knew or recklessly disregarded its falsity. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15 (1990); Pet. App. 57a. Petitioners' allegations provided no basis to infer that the newspapers acted with actual malice in reporting the accurate statement that petitioners' loss of consortium claim would by definition include "a claim for damage to the sexual relationship of a married couple." Pet. App. 57a. As the Pennsylvania Supreme Court noted, that is the plain meaning of a consortium claim, as was admitted by petitioners. *Id.*

However, since petitioners also vaguely alleged that they had told "some" or "a few" defendants that their claim for loss of consortium did not include a claim for harm to sexual relations, the Pennsylvania court allowed petitioners an opportunity to re-plead the claim to overcome that ambiguity and plead actual malice by identifying which newspapers had been provided with this information, and which newspapers disregarded that information in their published report on the suit. Pet. App. 66a, 69a-70a. The court offered petitioners this opportunity while expressing reservations about the likelihood they could in good faith make such an allegation, in part based on their attorney's

candid admissions in other federal litigation raising identical claims against publications including *Time* and *Newsweek*. Pet. App. 70a-73a.

Rather than imposing some limitation on pleading a defamation claim, the Pennsylvania court provided petitioners with an liberal *opportunity* to re-plead their defamation claim by alleging facts that would permit an inference of notice to these newspaper defendants that *these petitioners'* loss of consortium claim was unique, limited in scope, and that it did not include harm to sexual relations. Had they been able to do so, the court observed "it would be possible for a jury to conclude that [the] newspapers printed the article with actual malice." Pet. App. 70a. This grant of an additional opportunity to plead cannot reasonably be construed as the Pennsylvania court's having formulated a requirement, as described by petitioners, that a public figure plaintiff must allege it "unequivocally told a newspaper that what it was about to print was false in order to maintain an action for defamation." [Petitioners' statement of question presented].

Petitioners' argument that a writ should issue on grounds that the Pennsylvania Supreme Court's "rule is inconsistent with" *Herbert v. Lando*, 441 U.S. 153 (1979), is no more worthy of consideration. Pet. at 10. As co-respondent the *Philadelphia Daily News* correctly observes, the Pennsylvania court's decisions in this case did not address any evidentiary privilege, let alone accord to these newspapers a "state of mind" editorial privilege of the kind rejected by this Court in *Lando*. 441 U.S. at 175. Petitioners have neither identified a "rule" followed by the Pennsylvania Supreme Court, or anything in that court's decision that is inconsistent with *Lando*.

CONCLUSION

For the reasons stated in this brief in opposition, those stated by co-respondent the *Philadelphia Daily News*, and for the additional reasons explained by the Pennsylvania Supreme Court, and Pennsylvania Superior Court, respondent, the *Legal Intelligencer*, respectfully requests that this Court decline to grant the petition for writ of certiorari.

Respectfully submitted,

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